Sheffield Barbers, LLC *and* Nellis Barbers Association *and* UnChong Thrower. Cases 28–CA–199308, 28–CA–210447, and 28–CA–209734.

May 19, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On August 27, 2018, Administrative Law Judge Gerald Michael Etchingham issued the attached decision. The Respondent filed exceptions with supporting argument, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Sheffield Barbers, LLC, Nellis Air Force Base, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Nellis Barbers Association (NBA) as the exclusive collective-bargaining representative of employees in the bargaining unit.

(b) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(c) Engaging in surveillance of its employees' union activities.

(d) Telling employees that the Union's collective-bargaining agreement with the predecessor employer was a fraud and telling anyone who disagrees to "shut up."

(e) Telling employees that its contract with the Department of Labor supersedes their rights under the National Labor Relations Act.

(f) Discharging or otherwise discriminating against its employees because they openly discuss its new work rules related to compensation after work hours or any other terms and conditions of employment.

(g) Promulgating and maintaining work rules in retaliation for employees' protected concerted activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the NBA as the exclusive collective-bargaining representative of its employees at Nellis Air Force Base in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All barbers except the base manager, supervisors, and other employees excluded under the terms of the National Labor Relations Act.

(b) On request by the Union, rescind the changes in the terms and conditions of employment for its unit employees implemented on or after April 28, 2017, including (a) the reduction of commission rates paid to the unit employees, (b) changing the marvicide and paper-towel policies, and (c) implementing a new coupon rule.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of unlawful changes in the manner set forth in the remedy section of the judge's decision.

(d) Compensate unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(e) Within 14 days from the date of this Order, offer UnChong Thrower full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(f) Make UnChong Thrower whole for any loss of earnings and other benefits suffered as a result of the

[1] The Respondent's exceptions relate to the judge's finding that it violated Sec. 8(a)(1) of the Act by discharging employee UnChong Thrower. No exceptions were filed to any other aspect of the judge's decision, including the several other violations found.

As for the discharge of Thrower, there are no exceptions to the judge's finding that Thrower engaged in protected concerted activity. The Respondent also does not dispute that it knew about her actions. Rather, it challenges the judge's credibility-based findings that the discharge was motivated by Thrower's protected concerted activity. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[2] We shall modify the judge's recommended Order and substitute a new notice to correct omissions and to conform to the Board's standard remedial language, and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020).

discrimination against her, as set forth in the remedy section of the judge's decision.

(g) Compensate UnChong Thrower for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify UnChong Thrower in writing that this has been done and that the loss of employment will not be used against her in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Rescind the work rules promulgated on November 14, 2017, in retaliation for protected concerted activities.

(k) Post at its Nellis Air Force Base, Nevada facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2017.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 19, 2020

_____
John F. Ring, Chairman

_____
Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the Nellis Barbers Association (NBA) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

[3] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT change unit employees' terms and conditions of employment without first notifying the NBA and giving it an opportunity to bargain.

WE WILL NOT engage in surveillance of your union activities.

WE WILL NOT tell you that the NBA's collective-bargaining agreement with Gino Morena Enterprises was a fraud, and WE WILL NOT tell anyone who disagrees to "shut up."

WE WILL NOT tell you that our contract with the Department of Labor supersedes your rights under the National Labor Relations Act.

WE WILL NOT discharge or otherwise discriminate against you because you openly discuss our new work rules related to compensation after work hours or any other terms and conditions of employment.

WE WILL NOT promulgate and maintain work rules in retaliation for your or other employees' protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL recognize and, on request, bargain with the NBA as the exclusive collective-bargaining representative of our employees at Nellis Air Force Base in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All barbers except the base manager, supervisors, and other employees excluded under the terms of the National Labor Relations Act.

WE WILL, on request by the NBA, rescind the changes in unit employees' terms and conditions of employment implemented on or after April 28, 2017, including (a) the reduction of commission rates paid to the unit employees, (b) changing the marvicide and paper-towel policies, and (c) implementing a new coupon rule.

WE WILL make you whole for any loss of earnings and other benefits you suffered as a result of unlawful changes, plus interest.

WE WILL compensate you for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, offer UnChong Thrower full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make UnChong Thrower whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, less any interim earnings, plus interest, and WE WILL also make Thrower whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate UnChong Thrower for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to UnChong Thrower's unlawful discharge, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the loss of employment will not be used against her in any way.

WE WILL rescind the work rules promulgated on November 14, 2017 in retaliation for protected concerted activities.

SHEFFIELD BARBERS, LLC

The Board's decision can be found at http://www.nlrb.gov/case/28-CA-199308 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Stephen Kopstein, Esq., for the General Counsel.
Kevin Dolley and *David Nowakowski, Esqs. (Law Offices of Kevin Dolley, LLC),* for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, ADMINISTRATIVE LAW JUDGE. This case was tried on January 30–31, 2018, in Las Vegas, Nevada. The complaint alleges that Sheffield Barbers LLC (Sheffield or Respondent) engaged in numerous violations of the National

Labor Relations Act[1] (the Act) after taking over the barber shop at Nellis Air Force Base from the previous employer, Gino Morena Enterprises (GME), during the spring of 2017.[2] [3] Specifically, Sheffield is alleged to have violated Section 8(a)(1) of the Act by: directing employees to surveil the protected concerted activity of other employees; dismissing the collective-bargaining agreement asserted by the Nellis Barbers Association (NBA) as a false document; disrespecting the NBA's collective-bargaining representative during a meeting between employees and management; and disciplining and terminating employee UnChong Thrower (Thrower or Charging Party) for engaging in protected concerted activities. Sheffield also allegedly violated Section 8(a)(1) and 8(a)(5) by changing the employees' commission rate, instituting new workplace rules regarding insubordination and bullying, and requiring employees to supply their own tools, keep credit card receipts in the open, and pay for the cost of any improperly processed coupons without bargaining with the NBA.[4] Sheffield denies the allegations, and contends that it was under no obligation to adhere to the allegedly preexisting CBA, Sheffield management made GME's employees aware of the changes to their terms and conditions of employment prior to offering them jobs, good-faith bargaining between Sheffield and the NBA occurred, and that the barbers' commission never changed from 45.2 percent. As for Thrower, Sheffield asserts that she was lawfully terminated for cause, the circumstances of which required immediate termination, and that the NBA was properly consulted during the termination process.

On the entire record, [5] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Sheffield has been a Missouri limited liability company engaged in the retail sale of haircuts. Sheffield operates various facilities throughout the United States in performing that function, including a facility located at the Nellis Air Force Base Exchange (Nellis AFB), the only facility involved in this proceeding. In conducting its operations during the 12-month period ending May 22, 2017, Respondent performed services valued in excess of $50,000 in States other than the State of Nevada, and derived gross revenues in excess of $500,000. At all material times, Sheffield has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[6] I further find that at all material times, the NBA has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I also find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Operations

Sheffield has been individually owned by Christina Deardeuff ("Deardeuff") and her sister Claudette Michels (Michels) since July 1, 2014. Sheffield currently owns and operates barbershops at seven military bases where it employs 134 total employees, including the Barbershop at Nellis AFB. In addition to the Nellis Barbershop, two other barbershops run by Sheffield have union employees.[7] Deardeuff opined that having a union in place at a barbershop is easier for Sheffield because the union deals mostly with the barbershop employees.[8] Deardeuff also explained that it is Sheffield's normal custom and practice that she allows the union to come forward and present their current collective-bargaining agreement and then Sheffield and the union go into negotiations and "hack out our own agreement for a contract that we're on at that point."[9] As discussed below, Sheffield did not follow this same custom and practice and chose to ignore the NBA when it came forward with their ongoing CBA with GME in or before April 2017.

Contract Manager Yvonna Bays (Bays) assisted Deardeuff and Michels with hiring employees and other contract matters at the Barbershop before its opening at Nellis on May 1, 2017, prior to ending her employment with Sheffield. Eileen Dinger[10] also assisted Deardeuff and Michels with the installation of new equipment and helped find managers after Sheffield assumed ownership of the Barbershop. Trixie Monroe (Manager Monroe) is employed as a barber and a manager at the Barbershop beginning on November 9, 2017. Arlene Fiori (Fiori) also works as a lead barber and was briefly an assistant manager in August 2017. Fiori, as a lead barber for Sheffield, receives 2 percent more in commission pay than nonlead barbers and has added responsibilities to handle the cash drawers at Sheffield and make bank drops.[11]

The discriminatee, Thrower, was employed at the Barbershop for approximately 4 years as a barber. Thrower was originally hired by GME, and then worked for Sheffield from May 1 until her termination on November 11. Prior to November 11, Thrower was never disciplined. Barbara Dyson (Dyson), Myoung Suk Kim (Kim), Ruben Romero, Holly Arnold, Felicia Browning, and Maria Carpenter were some of the other barbers

[1] 29 U.S.C. §§ 151–169.

[2] Any reference to "Barbershop" is a reference to the barbershop located at the Nellis Air Force Base Exchange.

[3] All dates are 2017 unless otherwise indicated.

[4] The General Counsel withdrew the allegations in Paragraphs 6, 9, and 10 of the Complaint during the hearing of this case. (Tr. 522, GC Exh. 1(z).) Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; Jt. Exh. For joint exhibit; "GC Br." for the General Counsel's closing brief and "R. Br." for the Respondent's closing brief; and R. Reply for Respondent's reply brief to the GC Br. Although I have included numerous citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

[5] The transcript in this case (Tr.) is mostly accurate, but I correct it as follows: Tr. 138, line 9: "None of the CBAs were reached at ours like negotiations"; should be: "None of the CBAs were reached at arms-length negotiations."

[6] GC Exh. 1(cc) at 4.

[7] Tr. 109–110.

[8] Tr. 111.

[9] Id.

[10] Eileen Dinger is also known as Eileen Rhoads.

[11] Tr. 263, 548.

during the relevant time period and remain employed by Sheffield. Approximately five other barbers worked at the Barbershop in 2017. All of the former GME employees remained at the Barbershop after Sheffield succeeded GME with no new barbers.

B. The Nellis Barbers Association's Representation of the Barbers at Nellis AFB

The NBA was founded in 2014 for the purpose of engaging in collective bargaining with GME for wages and other terms and conditions of employment for NBA Barbers.[12] Dyson was selected as the NBA's president, and was the sole representative of the NBA during negotiations between Dyson for the NBA and Rex Morena for GME at the Grand Hotel in Las Vegas, Nevada.[13] Dyson was also an NBA barber and not a member of GME management in 2014.[14]

Over the course of approximately six additional phone calls and an in-person meeting with GME, Dyson bargained for the NBA with GME over the barbers' commission, vacation, the provision of necessary supplies, and other rules and regulations.[15] After bargaining sessions, Dyson would inform and receive input from the barbers at Nellis AFB about the proposed terms of the collective-bargaining agreement.[16] Later on, Carpenter was involved with Dyson in actually negotiating the CBA with GME management.[17] The barbers told Dyson which provisions they agreed to, and which ones they did not and Dyson would negotiate to get what the barbers demanded with back and forth with GME management.[18] At least one GME supervisor, Holly Arnold, was present when Dyson discussed collective bargaining matters with the barbers. Supervisors were not permitted to bargain directly with GME, but did review the bargaining documents provided by Dyson and discussed their contents with the other barbers.[19] Eventually, the bargaining efforts resulted in a collective-bargaining agreement (CBA) that was prepared by GME's lawyer and signed by all the barbers at Nellis AFB and by GME on August 15, 2014.[20]

The CBA provided an effective term of June 1, 2014, through May 31, 2017. The various articles of the CBA included a 45.2 percent commission rate, a provision that barbers would be responsible for furnishing and maintaining their own tools and uniforms, and a scheme for disciplining employees.[21] The CBA was kept in the manager's office at the rear of the Barbershop and one employee, Felicia Browning (Browning) confidently opined that the CBA is open for anyone to see in the filing cabinet in the manager's office/employee break room. At all times, Carpenter kept a copy of the CBA to herself and confirms that the CBA was hung up in the back manager office at the Barbershop and stayed there from 2014 until the last day of April 2017.[22]

C. The Solicitation

In December 2016, Deardeuff received a solicitation from the Army and Air Force Exchange Service (AAFES) to bid on the contract for the Barbershop.[23] The AAFES contract is governed by the Service Contracts Act which requires contractors on federal works projects to pay their workers the wages prevailing in the area where a project is located, also known as "prevailing wages," in an effort to stem the practice of employers bringing in lower-wage workers from outside the area. Prevailing wages, like state and federal minimum wages, set a minimum wage rate that employers must pay to workers.

By January 2017, GME was temporarily suspended and debarred from bidding on new U.S. government barber contracts including one at Nellis Air Force Base.[24] This temporary suspension opened things up for Sheffield to come in, win the bid, and take over the barber business at Nellis starting on May 1, 2017.[25]

Deardeuff purports that there was no CBA in effect at the Barbershop in December 2016 or January 2017 when she and Michels made their site visit to the Nellis Barbershop.[26]

Following the receipt of the AAFES solicitation, Deardeuff and Michels did a site visit and inspected the facilities at Nellis on January 12, 2017. Sheffield's two owners ignored the CBA that was kept in the manager's office at the rear of the Barbershop believing it to be invalid and deciding not to discuss it with the GME employees including the NBA representative Dyson, until *after* the NBA barbers accepted employment with Sheffield and the successor Barbershop was conducting business in the summer of 2017. Once the visit was over, Deardeuff and Michels gave their telephone numbers to Arnold with their hope of

[12] Tr. 323–324.

[13] Tr. 274, 324–325, 370.

[14] Tr. 325.

[15] Tr. 325–327; GC Exh. 16.

[16] Id.

[17] 273–274.

[18] 274, 306–307.

[19] Tr. 516–517. Arnold credibly testified about her role in the formation of NBA and the CBA, and her testimony was corroborated by Carpenter. (Tr. 307–308.) The only other GME manager alleged to have participated in the bargaining process was a "Kathy" whose role, like Arnold's, was limited to discussing the potential CBA terms with the other barbers.

[20] Tr. 270–272; GC Exh. 16, GC Exh. 22.

[21] The CBA contains an unenforceable poison pill provision that increases the NBA employees' commission rate to 55 percent upon the commencement of a new AAFES concessionaire contract, like Sheffield's, and a miscellaneous severability clause that provides that the CBA continues even if the poison pill provision violates state or federal law. GC Exh.16 at 3 and 15. Dyson recalled being asked for a copy of the CBA by Sheffield in late 2017 and not providing the document to Sheffield because "it didn't apply to what was going on with the NBA's various unfair labor charges in 2017 as she believed that Sheffield's request was specifically focused on the poison pill language at Art. IV of the CBA and Dyson had been instructed by the General Counsel that the poison pill provision was invalid, unenforceable, and unrelated to the matters at issue in this case. Tr. 374–376; GC Exh. 16 at 3 and 15.

[22] Tr. 272–273.

[23] Sheffield did not properly authenticate any documents from AAFES, the Department of Labor, or the System Award Management (SAM) website on January 24, 2018. Tr. 114–122.

[24] Tr. 123–126.

[25] The GME temporary suspension, which preceded the end of its business at Nellis on or about April 30, 2017, is a short suspension which will expire and allow GME to receive further AAFES solicitations and bid on future barber contracts on military bases. Tr. 126. GME's temporary suspension from AAFES solicitations specifically resulted from an unrelated collective-bargaining agreement at Shaw Air Force Base and not its CBA with NBA at Nellis Air Force Base. Tr. 122–123, 129.

[26] Tr. 115–116, 132. There was no admissible evidence presented to confirm that the CBA was not attached to the wage determination in the solicitation for the Nellis barber contract.

receiving follow-up correspondence from GME employees.[27]

Arnold called Deardeuff that evening and informed her that the commission rate at the barbershop was 45.2 percent.[28] In response, Deardeuff did not tell Arnold that Sheffield intended to reduce the barbershop commission rate to 33 percent.

D. The Transition from GME to Sheffield

On February 21, AAFES awarded Sheffield the barber services contract at Nellis AFB.

On March 3, Sheffield's owners, Deardeuff and Michels, mailed a letter solicitation to all of the GME employees with a blank personnel data form and a Sheffield employment application enclosed for Sheffield to obtain all of the necessary employment information to offer employment to all GME employees for continuous operations at the Nellis barbershop.[29]

The March 3 letter provides in pertinent part:

> On 21 February 2017, Sheffield Barbers, LLC was the successful bidder and awarded the contract to operate the barbershops, located at Nellis AFB, Nevada. Our contract will open for operation on May 1, 2017. This information can be verified through the AAFES Maecelle Cummings.
>
> While many of the contract details are confidential, but [sic.] Sheffield Barbers, LLC wants to reach out to current barbers and let them know that Sheffield has job opportunities available with our company and we currently are accepting applications for barber positions that include our Nellis AFB contract. . . .
>
> Enclosed are employment applications that should be completed for barbers interested in seeking employment on the new contract. Completed applications should be scanned, then emailed to Sheffieldbarbers@gmail.com or FAX to 573-765-2803 no later than April 7, 2017 so that initial screening can be completed. Sheffield Barbers looks forward to receiving applications from the barber[s] who wish to apply for employment that could allow you to continue to serve the Military customers.
>
> Sometime after April 17, 2017, Sheffield staff will coordinate a job fair with the applicants to go over company expectations, policies, and to answer questions for those selected for employment.
>
> Respectfully,
>
> Christina C. Deardeuff and Claudette Michels
> Owners[30]

Among other things, the personnel data form and employment applications from Sheffield asked GME employees for all information Sheffield would need for hiring decisions for each GME employee and to continue each employee's uninterrupted building access at Nellis AFB and make barbershop scheduling decisions, as Sheffield asked for GME employee's social security number, building and work hours, citizenship status, whether they had ever been convicted of a felony, state barber license number, a list of equipment supplied by each employee, two professional references, salary histories, and whether Sheffield can contact their previous supervisor for a reference.[31] The March 3 letter package, however, does not contain any disclosure to GME's employees by Sheffield that it intended to reduce the barbershop commission rate to 33 percent or change any other terms and conditions of employment.

On March 21, Sheffield's Bays sent an email to the GME employees with additional information about the job fair and their potential employment:

> Dear Barbers:
>
> Thank you very much for the submission of your application. I am Yvonna Bays the Contract Administrator for Sheffield Barbers, and I will be your initial point of contact during the contract change over process.
>
> Sheffield Barbers, LLC is an equal opportunity employer that seeks to provide optimum service and exceed contract expectations.
>
> Sheffield is contracted to assume barbershop services on May 1, 2017. AAFES will be coordinating the exiting of the current concessionaire and our moving into the facilities. Our contract is to operate the Barbershop at the Main BX and a barbershop at the Hospital. We are still evaluating sales data and personnel needs at this time.
>
> Sheffield will be hosting a Job Fair either on April 27th OR 28th at the facility to go over employment offerings that we seek to fill. As we finalize transition, I will send updated communication so that all applicants are current with developments. *Those selected and accepting employment will remain for the initial employment packet and paperwork phase of this meeting.* Sheffield Barbers utilizes mandatory direct deposit for payroll, if you do not have a bank account you may want to be considering where you will want to set one up.
>
> Should you chose [sic] to attend the Job Fair, you will want to bring copies of your barber/cosmetologist license, state issued driver's license, and social security card.
>
> Sheffield Barbers requires the use of commercial hair removal vacuums. These vacuums are the employee's responsibility to provide. We have arranged discounted pricing through our sales rep Danny at Central Vacuum Supply, who are offering ARRCO vac with 2 heavy duty hoses for the price of $414.99 plus shipping. To order your vacuum through Central Vacuum, call 877-822-7868 ext 6. *When you call you must ask for*

[27] GC Exh. 19, Tr. 57–58

[28] Tr. 507. Deardeuff was an uncooperative witness who frequently gave unresponsive answers to the General Counsel's questions or misstated facts. The affidavit she provided on June 20, 2017, is inconsistent with her testimony at hearing. GC Exh. 8, Tr. 66–69. Deardeuff initially denied having a phone call with Arnold before admitting that she did speak with Arnold via telephone that evening while at a casino. Tr. 58–59. Accordingly, I credit the testimony of Arnold over the testimony of Deardeuff as to the events surrounding the phone call after Sheffield's on-site inspection.

[29] Tr. 60–62; GC Exh. 5.

[30] GC Exh. 5. Emphasis added.

[31] GC Exh. 5 at 2–4.

Danny and tell him you are being employed by Sheffield at Nellis to receive the discounted pricing.

To the best of our knowledge, we are planning to be opened for full operation by May 3rd, as the installation of the new equipment will take a full day once we are issued the premise by AAFES.

There will one day of training on the new CPOS system and new shop operation policies prior to opening and this training date will be announced at the Job Fair.

Respectfully,

Sheffield Barbers LLC[32]

The March 21 email also does not contain any disclosure to GME's employees by Sheffield that it intended to reduce the barbershop commission rate to 33 percent or change any other terms and conditions of employment other than the new requirement that each GME employee was required to call Danny at Central Vacuum Supply and tell him that *all of GME's employees are being employed by Sheffield at Nellis*.

As a result of the mailings, Sheffield received completed personnel forms and Sheffield employment applications from all of the GME employees by April 7, 2017, with all of the necessary information for Sheffield to fully screen and offer employment to all GME employees.

The job fair began on April 28 at approximately 7:30 p.m. at the food court located within the Nellis AFB Exchange and ended around 8 pm.[33] Deardeuff, Bays, Michels, and Dinger[34] were all present on behalf of Sheffield; every GME barber except for one was in attendance.[35]

Bays introduced the Sheffield representatives at the meeting. Bays then asked the barbers to raise their hand if they wanted to accept employment with Sheffield, at which point every employee raised their hand.[36] All of the NBA employees at GME were hired by Sheffield to work at the Barbershop at this point on April 28, 2017, and no one else.[37] At no time did Sheffield conduct any job interviews or test any barbers before accepting all of the GME employees as Sheffield's barbers at Nellis AFB.

Later on April 28, *after* the showing of hands and acceptance of employment by GME's employees at Sheffield and only at the end of the April 28 meeting, Bay first told the barbers that their commission would be 33 percent, a 12.2 percent reduction from their previous and current pay.[38] Ruben Romero asked Bays if the commission rate was negotiable, and Bays replied that it was not.[39] Carpenter overheard Manager Dinger say at this time on April 28 that there was a collective-bargaining agreement in place when Sheffield took over the military base where she was working in 2017 on the east coast and that her pay did not go down when Sheffield took over the barbershop there as Sheffield maintained the commission rate for barbers in place under the prior collective-bargaining agreement.[40]

Bays went on and told the barbers that under Sheffield, they would receive the federal minimum wage and it would be $10.14 per hour and $4.27 per hour for the health and wellness and this came out to be a 33 percent commission rate.[41] The NBA barbers were very shocked and upset to hear about the reduced 33 percent commission rate because this is 12.2 percent less than the NBA barbers were paid by GME under the CBA through April 30, 2017.[42]

The meeting concluded shortly after the revelation of the new

[32] Tr. 329; GC Exh. 6. Emphasis added.

[33] Tr. 310.

[34] Dinger, an unemployed former manager for Sheffield at Shaw Air Force Base in South Carolina was flown in and put up at a Las Vegas hotel by Sheffield to testify about events in April 2017. Tr. 64–65. Bays did not attend the hearing yet did most of the talking for Sheffield at the April 28 and 29 meetings between Sheffield management and GME's NBA employees. Tr. 64–65.

[35] Tr. 275–278, 330–331.

[36] Tr. 278–279, 293–294, 332, 428.

[37] Tr. 234, 290, 293, 333, 428.

[38] Tr. 290, 293, 311, 332–333, 428–429.

[39] I credited the barbers' testimony regarding the job fair over that of Sheffield management. Deardeuff was not a credible witness, and her testimony was uncorroborated. Tr. 65–69; GC Exh. 8. When she was asked about what happened at the job fair, Deardeuff became defensive and began by talking about how she mentioned the wages before a showing of hands was asked for. Bays and Michels did not testify even though Bays did most of the talking at the April 28 and 29 meetings and Michels is Sheffield's co-owner sister of Deardeuff's and Michels also attended the meetings on April 28 and 29, and she was present at the entire 2-day hearing last January. For these reasons, Bays and Michels may reasonably be assumed to be favorably disposed toward Sheffield. *International Automated Machines*, 285 NLRB 1122, 1123 (1987) (internal citations omitted), enfd. 861 F.2d 720 (6th Cir. 1988) ("while we recognize that an adverse inference is unwarranted when both parties could have confidence in an available witness' objectivity, it is warranted in the instant case, where the missing witness is a member of management"). Further, that Sheffield formerly employed Bays and Michels remains a co-owner and percipient witness with Bays to the events in 2017 makes it particularly within Sheffield's power to call Bays and Michels to trial. I therefore draw an adverse inference against Sheffield, as "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. In particular, it may be inferred that the witness, if called, would have testified adversely to the party on that issue." Id. Thus, I infer that if Bays and Michels each would have been called, they would each have testified adversely to Sheffield's and Deardeuff's version of the facts in 2017. Sheffield did not provide any explanation as to why Bays and Michels did not testify, did not show that Bays and Michels were unavailable, and did not demonstrate that it tried to subpoena each of them to hearing. See *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact); *Martin Luther King Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify); accord *Graves v. United States*, 150 U.S. 118, 121 (1893) ("if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable"). This lack of testimony from Michels and, especially Bays, the Sheffield agent who did most of the talking at the job fair, and the strong, credible, and consistent testimony from Carpenter, Browning, Dyson, and Thrower, weigh heavily against the credibility of Sheffield's management witnesses who testified. Tr. 278–279, 293–294, 330–333, 429.

[40] Tr. 282–283.

[41] Tr. 279.

[42] Tr. 279, 333.

commission rate when custodians came to inform the group that the Exchange was closing for the evening. One small group of NBA barbers led by Thrower went back to the Barbershop to discuss their options for renegotiating the new 33 percent commission.

Three other barbers, Dyson, Carpenter, and Browning, stayed in the food court to talk with the Sheffield representatives.[43] After a brief conversation, one of the Sheffield representatives, either Deardeuff or Michels, instructed Dyson, Carpenter, and Browning to go to the Barbershop and find out what the other NBA barbers were talking about and to report back to Sheffield management.[44] At the Barbershop, Thrower suggested to the other barbers that they consider a walk-out or a strike, but was talked out of doing so.[45] Instead, Thrower also suggested that the barbers agree to meet again with Sheffield the next day to discuss their commission rate.[46]

Thrower exchanged email correspondence with Deardeuff and arranged for a meeting on April 29 at the rental home where Sheffield management was staying.

During the morning on April 29, Bays sent out a welcome email to the barbers who accepted employment at the job fair. The email discussed the logistics for various training initiatives, including PII training, POS system training, Sheffield forms, and shop tasks. The target date for opening the Barbershop was set for Wednesday May 3.[47]

All the NBA barbers attended the second meeting with Sheffield management on April 29, except for Kellie Romero. Bays, Michels, Deardeuff, and Dinger were all present for Sheffield. The meeting began with the barbers asking if it was possible for their commission to be increased. Bays told them that the commission was not negotiable because the commission was determined by Sheffield's contract with AAFES and the Department of Labor.

Thrower informed Sheffield that there was a collective-bargaining agreement and Carpenter insisted that she had a copy of the CBA with her available to review.[48] Bays called the CBA a sham or bogus document, and Deardeuff said the CBA is a lie and a fake document.[49] Dyson informed Sheffield that she was the president of the NBA but was told by Bays to "shut up."[50] Ultimately, there was no increase to the barbers' 33 percent commission or any other condition of employment at the conclusion of the meeting.

GME and the NBA barbers worked at Nellis AFB and provided uninterrupted barber services from June 2014 through April 30, 2017, when Sheffield succeeded GME on May 1.

E. Barbershop Operations Under Sheffield

Employee orientation for the barbers began on May 1. There was no gap in the NBA employees' services and compensation between the end of their employment on April 30 and the beginning of operations on May 1. Like at GME and now with Sheffield, the primary service provided by the Barbershop was haircuts.[51]

On May 1, all of the GME NBA barber employees began work at Sheffield and were asked to sign off on receiving the Employer handbooks and asked to sign W-4 and I-9 documents.[52] On May 2 or May 3, Bays informed the barbers that they would have to provide their own marvicide, hand towels, tissues, and capes, all of which were previously provided by GME.[53] Also new to the NBA barbers by May1, 2017, as first referenced in Bays' March 21 email to GME employees, each barber was mandated to own a vacuum, the cost of which was automatically deducted from their paychecks.[54]

Also beginning on May 1, Sheffield management instituted new rules for handling coupons, credit card receipts and shortages at the register. If a coupon did not have the date, name, and telephone number of the customer, the barber was obligated to pay for the haircut. Credit card receipts, previously held inside the register, were to be kept next to the register. In the event of a shortage at the register, the barbers who were working when the shortage occurred would have to split the cost of the deficit.[55]

Dyson filed the NBA's first charge against Sheffield on May 22. The charge alleged that within the last 6 months or at least since April 29, 2017, Sheffield failed to bargain collectively and in good-faith with the NBA by making unilateral changes to the terms and conditions of employment without prior notice to the NBA or an opportunity to bargain about the new rules and reduced commission.[56] The first amended charge was filed on

[43] Tr. 333–334.

[44] Tr. 334. The witnesses for both the General Counsel and Respondent provided little explanation of the conversation that occurred prior to the Sheffield representative's request for the barbers to spy for them at the NBA Barbershop meeting. (Tr. 71–72, 279–281, 313–314, 333–334). None of the three barbers, Dyson, Carpenter, or Browning, were able to articulate who specifically made the request though Carpenter recalled that it was either Deardeuff or Michels as some of the testimony did not mention Bays or Dinger specifically. Id. I find that the request was made by Sheffield management, Deardeuff or Michels, given the consistent testimony of Dyson, Carpenter, and Browning, all three of which are still employed by Sheffield. As stated above, Michels and Bays did not testify for Sheffield and no other witness to the conversation corroborated Deardeuff's version of these events. Michels was present at the entire hearing but Sheffield did not ask her to testify to provide support for its version of facts.

[45] Tr. 334–335.

[46] Tr. 335, 431.

[47] R Exh. 6. In her hearing testimony, Deardeuff described the email as a welcome letter for everyone who accepted employment at the job fair. (Tr. 177.)

[48] Tr. 336, 372, 431.

[49] Tr. 283, 336–337, 431–432. Based on the preponderance of evidence as to how the NBA's CBA came into being, I find that the 2014 CBA between GME and the NBA barbers is not a sham or fraud and that it was negotiated in good-faith between GME and the NBA. See GC Exh. 16.

[50] Tr. 283, 336.

[51] Tr. 283–284.

[52] Tr. 333.

[53] Deardeuff did not contradict this testimony when discussing the employee manual and employee expectations. (Tr. 171–173.)

[54] Tr. 298; GC Exh. 6; GC Exh. 22.

[55] Tr. 283–286, 337–338. These policies were all enacted on or after May 1. GME did not charge NBA barbers for cash shortages, it would locate the shortage in its bookkeeping or solve the infrequent shortage on a case by case basis. Tr. 338.

[56] GC Exh. 1(b).

June 6, adding an allegation that Sheffield made threats of unspecified reprisals and statements of futility about collective bargaining.[57] On September 28, the NLRB issued a complaint against Sheffield pursuant to the first amended charge.[58]

From May 1 to August 27, 2017, Sheffield reduced the commission rate paid to all NBA barbers from 45.2 to 33 percent.[59]

On August 23, Sheffield's lawyer sent a letter to Dyson informing her that he and his law firm represented Sheffield and requested that an initial bargaining session between the NBA and Sheffield be scheduled.[60] In that same letter, Sheffield ordered Dyson to "direct all future communications regarding bargaining to [Sheffield's lawyers'] office."[61]

With no advance notice to the NBA, on August 28, Sheffield raised the NBA barbers' commission rate from 33 to 45 percent.[62] The 45 percent commission remained for four pay periods until Sheffield changed the commission back to 33 percent on October 23, again without any advance notice to the NBA.[63] On November 21, Dyson emailed Sheffield requesting that the NBA barbers' commission rate be returned to 45 percent and to bargain over the change of pay.[64]

During a bargaining session with Dyson, Deardeuff notified Dyson about the reduction in commission but did not provide an opportunity to bargain. Dyson asserted that the commission should be returned to 45 percent pursuant to the authority of the National Labor Relations Board ("NLRB"). Deardeuff or Sheffield counsel informed Dyson that the Department of Labor and not the NLRB set the commission rate at the Barbershop.[65]

On November 21, Dyson emails Sheffield management requesting that Sheffield raise the commission rate paid to NBA barbers to 45 percent.[66]

On November 24, Dyson filed the NBA's final charge against Sheffield. The charge alleged that about since October 23, Sheffield failed to bargain in good faith with the NBA by making unilateral changes to the rates of pay for employees.[67]

F. Discipline and Discharge of UnChong Thrower

On November 9, Manager Monroe began working as a manager at the Barbershop.[68] Monroe ordered the barbers to remove the tools and supplies from their workstations because of a purported failed health inspection. Thrower complied with the order and asked Monroe if she had a copy of the alleged failed health inspection document. Monroe told Thrower that she did not have a copy of the document, and informed Thrower that she was the new Sheffield manager. Thrower had worked with GME and then Sheffield for almost 4 years at this time.

When Thrower went to check out one of her customers, Monroe went over to the cash register and told her that there was a new "buddy system" governing transactions at the register. The new policy mandated that there be two employees present whenever a transaction at the register occurred. Thrower asked Monroe why the policy was enacted, and Monroe responded that it was because of shortages at the register.[69]

Upset and embarrassed by this response, Thrower told Monroe that she did not take kindly to being accused of theft without any proof and Monroe responds to Thrower telling her to speak with Sheffield home office management about her complaints.

After checking out a customer, Thrower tried to explain a different way of handling register shortages to Monroe and requested documentation of the "buddy system" policy. Monroe again stated that she had no such documentation and instructed Thrower to speak with Sheffield management in Missouri. Thrower finished by telling Monroe that the barbers were all adults who did not need to be micromanaged by a new manager.

On the Veterans Day holiday on Friday, November 10, Thrower and Kim worked from 9 a.m. to 5 p.m. During the early afternoon, Monroe asked which employees would like to leave early. Thrower told Monroe and Kim that she would like to leave early and that she was taking her Air Force member husband out to dinner between 5:30 and 6 p.m. to celebrate Veterans Day but was told by Monroe to stay until after 5 p.m. to help with closing the Barbershop.[70]

At approximately 5 p.m., Thrower told Monroe that she was going to leave. Monroe insisted that Thrower stay and help Monroe with closing the Barbershop. Thrower asked Monroe if Kim, the other remaining employee at the Barbershop, could stay and close instead. Monroe asked if Kim was capable of closing and Thrower, in Kim's presence, assured Monroe that Kim could do so as Kim had closed the Barbershop by herself at least twice before in the last 2 weeks.[71] Thrower asks Kim if she can close on November 10 and Kim responds by saying: "Ok."[72]

On her way out of the Barbershop between 5:15–5:20 p.m., Thrower stopped to ask Monroe how they would be paid if they stayed late given that they were paid based on commission.[73] Monroe told Thrower that she would have to ask Sheffield management about it.[74]

Thrower went to work on November 11 at 9 a.m. Kim saw Thrower and told her that it took Kim an hour to close out the Barbershop on November 10.[75] Thrower's reaction in response to Kim was to get angry at Manager Monroe almost yelling the question to Kim: "Is Manager Monroe or Sheffield going to pay you for you staying an extra hour on November 10?"[76]

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[57] GC Exh. 1(c).
[58] GC Exh. 1(i).
[59] Tr. 389; GC Exh. 1(a).
[60] GC Exh. 3.
[61] Id.
[62] Holly Arnold's paystubs reflect that she was paid 33 percent commission from August 14 to 27, and then paid 45 percent commission for the pay period spanning August 28 to September 10. Tr. 84; GC Exh. 24, at 1–2.
[63] Tr. 85–86, 352; GC Exh. 24, at 2–6.
[64] Tr. 86–87; GC Exh. 17.
[65] It is unclear whether Deardeuff or her attorneys told Dyson that the Department of Labor would decide the barbers' commission. Nonetheless, an agent or agents of Sheffield made the remark to Dyson during the bargaining session. Tr. 86–89.
[66] Tr. 354; GC Exh. 17.
[67] GC Exh. 1(p).
[68] Tr. 433.
[69] Tr. 434–435.
[70] Tr. 166–167, 437, 477–478.
[71] Tr. 146, 437.
[72] Tr. 437–438.
[73] Tr. 146, 437–438.
[74] Tr. 438.
[75] Id.
[76] Tr. 146–147, 154–155.

Kim next tells Thrower to stop talking and Thrower says to Kim: "What do you know?"

Kim next asks Thrower: "What is going on?"[77] Thrower answers Kim by telling her about a recent incident involving Carpenter where Carpenter was sick and missed work but was unable to get a doctor's note for Sheffield and received a write-up from Sheffield.[78]

Around 10 a.m., on November 11, Monroe summoned Thrower into the manager's office. Dyson was waiting in the office, and Deardeuff was on a telephone line with Monroe. Deardeuff admits that Sheffield has a progressive discipline policy and opined that Sheffield's written warnings to Thrower, referenced below, were to be reduced to a verbal warning after Deardeuff discussed the November 10 events with Thrower and Dyson.[79]

Manager Monroe circled and issued both a verbal and a written warning to Thrower dated November 11 for being disrespectful and insubordinate to Manager Monroe on November 9.[80] Thrower said that she disagreed with both warnings and refused to sign. Monroe and Deardeuff also admonished Thrower for refusing to help close and making Kim stay late to assist Monroe.[81] Manager Monroe also told Thrower and Dyson that by not staying to close on November 10, Thrower forced Kim to close and Kim did not know how to close and that this created a stressful night for Monroe and Kim.[82]

Thrower insisted that staying past her scheduled shift to help close without pay was not part of her job duties.[83] Thrower also reminded Deardeuff and Monroe that Sheffield told the NBA barber employees that the only ones who can close the Barbershop are the manager and the shop lead barber [Fiori] and that Thrower was not a shop lead on November 10.[84]

Deardeuff agrees with Thrower over the telephone and tells Thrower, Dyson and Monroe that Sheffield will not issue discipline to Thrower for refusing to take responsibility and close the Barbershop on November 10.[85] This warning for refusing to take responsibility on November 10 was next torn up by Monroe and thrown in the trash in front of Thrower and Dyson but a copy of it was also sent to Sheffield's home office in Missouri to be placed in Thrower's personnel file.[86]

After receiving her written warnings, Thrower left the office and had a conversation with Kim. Thrower said that because Kim did not closeout the Barbershop properly on November 10, this became a problem for Thrower.[87]

When the conversation was over, Thrower left for lunch with Dyson while Kim went to the supervisor's office crying. Kim told Monroe and Deardeuff that if Thrower was getting written up, it was because of what Kim had done closing on November 10 and asked Manager Monroe if she could remove the write-up that Thrower had received.[88] Neither Monroe nor Deardeuff told Kim that Thrower had earlier convinced them to reconsider and tear-up the written warning to Thrower for refusing to take responsibility on November 10.

Kim opined that because of her inability to communicate well in English, Kim was unsure whether she was able to properly communicate this to Manager Monroe but that Monroe did not react in any noteworthy way to Kim's statements on November 11.[89] Kim does admit that she cried in front of Manager Monroe on November 11 because Kim believed that Thrower was getting in trouble because of Kim's conduct closing the Barbershop on November 10.[90]

Kim spoke to Monroe and Deardeuff, who was on the phone with Monroe and made reference to Thrower being a "strong woman" but did not use the terms "bully" or "bullying" or "intimidation" or "harassment."[91] Kim insisted that she was supposed to close on November 10 and asked them not to discipline Thrower for her mistake.[92]

After Kim left the office, Deardeuff and Monroe agreed that despite Sheffield's progressive discipline policy and Thrower's spotless discipline record, Manager Monroe would immediately terminate Thrower as they misinterpreted Kim's "strong woman" description of Thrower to be that Thrower "bullied" Kim.[93]

Kim forcefully testified that she never told anyone, including Manager Monroe or Deardeuff on November 11, that Thrower

[77] Id.

[78] Thrower and Kim speak Korean together and have worked together for at least 5 years. According to Kim, Thrower helped Kim move from Virginia to Las Vegas to work at the Barbershop and the two have worked side-by-side for 3 years in Virginia and at least 2 years in Las Vegas. Tr. 150, 152, 159. Like many employees with years of working next to each other, Kim admits that they would occasionally get on each other's nerves which created stress between the two of them. Tr. 159.

[79] Tr. 94–95, 339, 342.

[80] Tr. 439; GC Exh. 12. Dyson also signed this employee warning report to Thrower, the first of three issued to Thrower and signed by Dyson on November 11.

[81] Tr. 439–440.

[82] Tr. 95, 439–440; GC Exh. 12.

[83] Tr. 342, 440. For example, Fiori as a lead barber gets paid an additional 2 percent more than other non-lead barbers for having the added job duties of handling the cash registers and doing bank drops outside of normal work hours.

[84] Tr. 467–468.

[85] Tr. 440.

[86] Tr. 339–342; 440–441; GC Exh. 12.

[87] Tr. 154–156.

[88] Tr. 156.

[89] Tr. 157.

[90] Tr. 158.

[91] Kim is Korean and admits that she does not speak English very well and she is uncomfortable speaking English. Kim speaks "broken English." Tr. 98, 147. Deardeuff also admits that she does not speak Korean. Tr. 97–98. Dyson also opines that Kim does not speak English very well. Tr. 347.

[92] Tr. 98.

[93] Various explanations were given for Thrower's termination. The 2-page employee warning report states that Thrower is being issued a written warning for "bullying" and is also being terminated for bullying and gossiping despite Sheffield's progressive discipline policy. Tr. 100–101; GC Exh. 13. Monroe testified that Thrower was terminated for insubordination, bullying Kim, and bullying her. Tr. 248–249. Deardeuff stated that Manager Monroe was authorized to discharge and discipline Thrower on November 11 for bullying and because of an ongoing pattern of bullying and intimidation although Deardeuff admits that Sheffield has no written documentation of any prior instance or ongoing pattern of bullying or harassment by Thrower. Tr. 89–90, 98–100, 102–103.

had gotten mad at Kim or that she felt scared.[94] Dyson also told Monroe and Deardeuff on November 11 that Thrower had never bullied anyone as far as Dyson was concerned, and Dyson had never heard of Thrower bullying anyone.[95] Carpenter confidently opined that she never observed Thrower bully or intimidate anyone of the NBA barbers.[96] Fiori also did not hesitate to provide her knowledge that she has never personally had any bad experiences working with Thrower over the years.[97]

In fact, Kim specifically denied she was bullied by Thrower on November 10 or 11 and she also says that Thrower, instead, is very opinionated with a "very outgoing" personality.[98] Kim further described Thrower as a leader who Kim would sometimes follow.[99]

Nonetheless, Deardeuff asked Manager Monroe to call Dyson into the office. When Dyson arrived sometime between 1–2 p.m. on November 11, Monroe told her that Thrower had bullied and harassed Kim, and was therefore being terminated.[100] Dyson responded by telling Monroe and Deardeuff that Thrower had never bullied anyone as far as Dyson was concerned and Dyson had never heard of Thrower bullying anyone.[101]

Monroe next asked Dyson to sign the warning slips to confirm that the warnings were discussed with Thrower. One of the two warning slips prepared by Manager Monroe on November 11 that resulted in Thrower receiving a written warning for bullying states as follows:

> After issuing Loren UnChong Thrower a corrective for insubordination she went onto the floor while customers were present and threatened Kim Myoung Suk, "saying it was her fault she got the corrective." Loren [Thrower] left to lunch and Miss Suk [Kim] came into my office Trixie Monroe the manager in tears stating she doesn't want to be stressed or work in an environment that she scared of.[102]

Manager Monroe issued Thrower a second written warning report also on November 11, this time a termination for bullying/gossiping that states as follows:

> Loren UnChong Thrower was counseled due to here [sic.] Kim Myoung Suk close for her on 11/10/17, and agreed she understands. Right after the counseling session before she took her lunch break she went and threatened Miss Suk. While Loren [Thrower] was at lunch Miss Suk came into my office (Trixie) balling her eyes out saying Loren [Thrower] threatened her & she was extremely scared & she was the fault of Loren's write [sic.]. Sheffield will not tolerate bullying, stressful environment, nor a hostile workplace and Loren [Thrower] demonstrated them all. Loren UnChong Thrower will no longer be employed by Sheffield Barber's due to these reasons.[103]

Both discipline forms cover the same alleged conduct against Thrower on November 11, 2017.[104]

Next, Thrower was called into Monroe's office where Monroe told her she was fired.[105] Thrower asked Monroe why she was being fired. Monroe responded that it was because she was bullying and gossiping.[106]

At no time did Manager Monroe or Deardeuff speak to Thrower to get her side of the story about what was said between Thrower and Kim before Thrower left for lunch on November 11.[107] Dyson told Monroe and Deardeuff that she was unaware of any bullying done by Thrower, and requested that Thrower be issued and warning or suspension instead as part of Sheffield's progressive discipline policy.[108] Dyson's recommendation was rejected, and Thrower was fired on November 11.

The following day, Dyson asked Kim to go see a Korean interpreter who worked at Nellis so that she could hear Kim's explanation interpreted to English from Korean.[109] Monroe denied Kim permission to leave the Barbershop to talk with the interpreter because Kim was not on break.

After Thrower was terminated and on November 14, 2017, Manager Monroe posted a notice in the Barbershop outlining new rules governing employee conduct.[110] The notice was written in English and not Korean and listed that the following offense would be grounds for immediate termination: insubordination, bullying, gossip, and disrespect. Dictionary definitions were provided after each listed offense. Id. Manager Monroe handed this list of words and definitions out to NBA employees and asked the employees to sign the list and return it back to her.[111]

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[94] Tr. 156.

[95] Tr. 344, 348–349. While Kim and Dyson have both noted that Thrower has a fiery temper, Kim denies that Thrower directed any temper tantrum at her on November 11 and no other credible NBA barber came forward in support of Sheffield's misguided belief that Thrower lost her temper on November 11, bullied Kim, or intimidated Kim or anyone else. Dyson further opined that with years of experience, she has never observed Thrower being an angry person. Tr. 417.

[96] Tr. 289.

[97] Tr. 265–266. Fiori even confirmed my follow-up question that she never had any personal bad experiences working with Thrower before Thrower was terminated. Tr. 266. Unbelievably, however, Fiori changed her unequivocal testimony and the next day during Sheffield's defense, Fiori made up her story that Thrower had bullied and harassed her in response to an inappropriate leading question. Tr. 546. Later, Fiori says that she purportedly wrote a letter to Sheffield's owners telling them that Thrower was harassing her. Tr. 548. No letter documenting this was produced by Sheffield at hearing in response to the General Counsel's subpoena. I reject all of Fiori's testimony in support of Sheffield's defense on day 2 of the hearing as untrue and in complete contradiction of her testimony the day before without any legitimate explanation and when compared to the overwhelming evidence provided by more reliable witnesses that Fiori had no bad experiences with Thrower, the CBA existed at GME prior to Sheffield's arrival at Nellis, and that the 33 percent commission wage rate was only mentioned by Bays *after* all NBA barbers raised their hands and accepted employment with Sheffield on April 28.

[98] Tr. 157–158.

[99] Tr. 158.

[100] Tr. 343–344.

[101] Tr. 344, 348–349.

[102] GC Exh. 13 at 1.

[103] GC Exh. 13 at 2.

[104] Tr. 102; GC Exh. 13 at 1 and 2.

[105] Tr. 441.

[106] Tr. 442; GC Exh. 13 at 2.

[107] Tr. 101.

[108] Tr. 347, 404–405.

[109] Tr. 347–349.

[110] GC Exh. 14.

[111] Tr. 290, 351.

LEGAL ANALYSIS

I. CREDIBILITY

A credibility determination may rely on a variety of factors, including the context of the witness' testimony; the witness' demeanor; and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above at 622.

I have also considered the longstanding principle that "the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996), citing *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978), enf. denied for other reasons, 607 F.2d 1208 (7th Cir. 1979) and *Georgia Rug Mill,* 131 NLRB 1304, 1304 fn. 2 (1961); see also *Federal Stainless Sink Division of Unarco*, 197 NLRB 489, 491 (1972). As a result, I credit the testimony of current NBA barber employees Dyson, Carpenter, Browning, and Kim over the testimony of Manager Monroe and Deardeuff for this reason and others provided above.

Also, I note that when credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69 slip op. at 1 fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

Thrower testified in a straight-forward no-nonsense manner confident in her recollection of the facts surrounding the April 28 and April 29 events with Sheffield management and the specific incidents from November 9—11, 2017. Thrower and Dyson were much more believable than Monroe and Deardeuff as to Thrower's spotless employment record at Respondent and her interaction with Kim and Monroe in early November 2017.

As referenced above in my findings of fact, Deardeuff was not a credible witness and made a number of false statements. Most significantly, Deardeuff was not being truthful when she testified that on April 28, 2017, the NBA employees were told that they would be paid a new lower commission rate of 33 percent by Sheffield *before* they all raised their hands and accepted employment with Sheffield in response to Bays' invitation for employment.[112] In addition, Deardeuff's June 20, 2017 affidavit, made under penalty of perjury, erroneously refers to an early May 2017 meeting at a house rented by Sheffield management when the overwhelming evidence shows that this meeting took place less than 2 months earlier over 2 days on April 28 and 29, 2017 and not early May 2017. More importantly, in the same affidavit, Deardeuff falsely states that at this meeting with the GME NBA barbers, Deardeuff "asked the barbers whether they were aware of a collective-bargaining agreement (CBA)", that "[t]he barbers did not indicate they were aware", and that "[t]he barbers did not indicate they had elected a bargaining representative."[113] Instead, Sheffield management, including Deardeuff, Bays, and Michels, were told on April 29, 2017, that there was a binding and effective CBA between the NBA barbers and GME, Carpenter offered to present the CBA to Sheffield management, and Sheffield management was informed that Dyson was the NBA's bargaining representative and its president. These facts also make false Deardeuff's additional declarations that: (1) Sheffield received no direct contact from the Nellis Barbers Association; (2) she [Deardeuff] "was not aware that the Nellis Barbers Association existed until Sheffield receive [sic.] the [May 22] unfair labor claim"; and (3) Deardeuff was "not aware if the Nellis Barbers Association ever executed a CBA with the predecessor [GME]."[114]

Deardeuff also misstates facts by not admitting that either she or her sister Michels asked Dyson, Carpenter, and Browning to go spy on the GME NBA barbers at the Barbershop and report back to Sheffield management after the April 28 group meeting when a smaller group of NBA barbers went back to the closed barbershop to discuss their strategy once Sheffield management told the NBA barbers that their commission rate would be cut to 33 percent. Deardeuff and Manager Monroe also falsely stated that Kim had reported that Thrower had bullied and intimidated her on November 11 when the preponderance of the evidence shows that Kim flatly denied saying this and no one had ever experienced any incident involving Thrower bullying or intimidating another NBA barber. Finally, Deardeuff was not truthful when she unbelievably opined that her recollection of facts that occurred prior to June 2017 was better at the January 2018 hearing than it was when she executed her affidavit under penalty of perjury in June 2017.

II. ALLEGED VIOLATION AGAINST SHEFFIELD FOR FAILING TO BARGAIN WITH THE NELLIS BARBERS ASSOCIATION

The General Counsel contends that Sheffield is a successor employer to GME who had an obligation since on or before May 1, 2017, when its contract to operate the Barbershop began, to recognize and bargain with the NBA and Dyson as the barbers' collective-bargaining representative. Sheffield rejects these claims with multiple arguments, including that Sheffield is not a successor employer and that Sheffield did not represent to the NBA and its members that it would adhere to the terms of the predecessor's CBA.

A. A Successor Employer and its Duty to Bargain

The Board's successorship doctrine is "founded on the premise that, where a bargaining representative has been selected by employees, a continuing obligation to deal with that representative is not subject to defeasance solely on grounds that ownership of the employing entity has changed." *Hudson River Aggregates, Inc.*, 246 NLRB 192, 197 (1979), enfd. 639 F.2d 865 (2d Cir. 1981), citing *NLRB v. Burns Security Services*, 406 U.S. 272,

[112] Tr. 65–66.

[113] Tr. 75; GC Exh. 8 at 2.

[114] Tr. 75; GC Exh. 8 at 3.

279 (1972). In *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court agreed with the Board that a union's presumption of majority support:

> continues despite the change in employers. And the new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor.

482 U.S. at 41.

In *NLRB v. Burns Security Services*, 406 U.S. 272, 281–295, the Supreme Court held that a successor employer is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is generally free to unilaterally set initial terms and conditions of employment. The Supreme Court further explained that the duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident whether the union will retain majority status in the new work force until after the successor has hired a full complement of employees. Id.

The Supreme Court recognized an exception to this rule, the "perfectly clear" exception, however, that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before it fixes terms." Id.

In *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), the Board addressed the "perfectly clear" exception, and found it was "restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 3 (2016). Acknowledging that "the precise meaning and application of the Court's caveat is not easy to discern," the Board reasoned that "[w]hen an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court," because of the possibility that many of the employees will reject employment under the new terms, and therefore the union's majority status will not continue in the new work force. Id.

In cases subsequent to *Spruce Up*, the Board clarified that the perfectly clear exception is not limited to situations where the successor fails to announce initial employment terms before it formally invites the predecessor's employees to accept employment. Rather, a new employer has an obligation to bargain over initial terms when it displays an intent to employ the predecessor's employees without making it clear that their employment will be on different terms from those in place with the predecessor. *Creative Vision Resources, LLC*, at 3, citing *Canteen Co.*, 317 NLRB 1052, 1053–1054 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997). Thus, in applying the "perfectly clear" exception of *Burns*, the Board scrutinizes not only the successor's plans regarding the retention of the predecessor's employees, but also the timing and clarity of the successor's expressed intentions concerning existing terms and conditions of employment. *Creative Vision Resources, LLC*, at 7. To avoid "perfectly clear" successor status, a new employer must clearly announce its intent to establish a new set of conditions prior to, or simultaneous with, its expression of intent to retain the predecessor's employees. *Nexeo Solutions*, LLC, 364 NLRB No. 44, slip op at 6 (2016).

B. Sheffield is a Perfectly Clear Successor to GME

The evidence in this case establishes that Sheffield is a perfectly clear successor to GME. It is undisputed that a majority of GME's barbers were hired by Sheffield; in fact, all of Sheffield's barbers were hired from GME. The only applicants in attendance at the job fair were the then-current barbers of GME. Sheffield did not bring in any outside personnel to staff the Barbershop when it assumed operations, waiting approximately 6 months before bringing in Manager Monroe.

I find that Sheffield's March 3 letter package to all of GME's employees manifested Sheffield's intent to retain all GME's employees because it was sent to each of them and it asked for them all to complete and return to Sheffield the enclosed employment applications and personnel data forms which allowed Sheffield to fully screen each employee in advance once it received the requested information by April 7. Nowhere in the March 3 letter package is there any reference to Sheffield's intention to reduce each barber's commission to 33 percent or make any other changes to the then-current terms and conditions of their employment.

After submitting extensive personnel data information and employment applications to work for Sheffield by April 7, the barbers were once again informed of a job fair by Bays' March 21 email, which turned out to be a mere formality in the hiring process. Applicants were told to bring employment credentials, set up a bank account if they did not already have one, and purchase a vacuum. The March 21 email also stated that those selected and accepting employment were instructed to "remain for the initial employment packet and paperwork phase of this meeting." Aside from a cursory statement that "we are evaluating employment needs," no indication was given that not all applicants would be accepted for employment or that there were any additional steps in the hiring process such as a job interview or testing beyond attending the job fair with the proper credentials and raising their hands when offered employment. While the March 21 email contains one change in the GME employees' terms and conditions of employment – the requirement that they purchase a $414.99 vacuum, there is no reference to Sheffield's intention to reduce the barbers' commission to 33 percent or change any other term or condition of their employment.

This case is analogous to *Creative Vision Resources, LLC*, 364 NLRB No. 91 (2016). In that case, the new employer distributed applications to the predecessor's employees and told them that those who wished to retain their jobs after the transition were required to complete an application and tax form; the employer did not interview the employees. Id. at 2. The Board noted that

allowing a successor to convince a majority of the predecessor's employees to not seek other work by avoiding telling them about changes in their terms and conditions of employment would be at odds with the Supreme Court's decision in *Burns* and the Board's decision in *Spruce Up*. Id. at 6, citing *S & F Market Street Health Care*, 570 F.3d 354, 359 (D.C. Cir. 2009) (holding that the perfectly clear exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees lulled into not looking for other work).

Thus, the Board found that a new employer that expresses an intent to retain the predecessor's work force without concurrently revealing that different terms and conditions of employment will be instituted, improperly benefits from the likelihood that those employees, lacking knowledge that terms and conditions will change, will choose to stay in the positions they held with the predecessor, rather than seek employment elsewhere. *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 6. In this case, Sheffield made no reference to making specific changes to GME's terms and conditions of employment until *after* the barbers raised their hands at the April 28 job fair to accept employment. Sheffield's shocking revelation of the considerably lower commission rate did not occur until the very end of the April 28 job fair after the GME employees had already said yes to Sheffield's offer of employment, 3 days before Sheffield was to assume operations from GME.

Sheffield insists that it was "obvious" from the communications to the barbers leading up to the job fair that there were going to be new terms and conditions of the barbers' employment. However, the only example cited is the requirement for the purchasing of vacuums, which would also indicate that the GME barbers were all-but-guaranteed employment with Sheffield prior to the job fair. Avoiding perfectly clear successor status requires an employer to clearly announce its intent to alter terms and conditions before offering employment to the predecessor's employees. *Starco Farmers Market*, 237 NLRB 373, 373 (1978). None of the vague language in the March 3 letter package or the March 21 email Sheffield sent to the GME employees before the job fair is convincing evidence of Sheffield's intent to make specific changes to the terms and conditions of the barbers' employment despite Sheffield's knowledge of the 45.2 percent commission rate and the ongoing CBA.

In sum, Sheffield retained a majority of GME's employees and intended to continue the exact same barber business operated by GME uninterrupted. Sheffield gave GME's employees the impression that they were all welcome to work for Sheffield should they return the requisite personnel data information and employment applications by April 7, possess the proper credentials, and attend the Sheffield job fair. The only change the GME barbers were appraised of was the need to purchase their own vacuums if they wanted to work for Sheffield. Bay's March 21 email plainly indicated that the barbers were to begin the process of preparing for the first day of work by purchasing their own commercial hair removal vacuums after telling the vacuum salesman Danny that they were already employees of Sheffield well before April 28. Sheffield communicated the change in the vacuum policy to the barbers in the March 21 email prior to the April 28 job fair but chose to withhold the other changes it intended to make until after it had secured employment from the GME barbers. Sheffield's concealment of its changes to GME's terms and conditions of employment to avoid losing the convenience of hiring GME's employees is exactly what the Supreme Court in *Burns* and the Board in *Spruce Up* sought to avoid through the successorship doctrine.

Accordingly, I find that Sheffield expressed an intent to retain all of GME's employees without making it clear that employment would be conditioned on the acceptance of new commission and other terms and conditions of employment other than the required purchase of a new vacuum. As a result, Sheffield is a perfectly clear successor to GME in April 2017 when GME's employees accepted Sheffield's job offer on April 28.

C. Unlawful Unilateral Changes to Work Terms and Conditions

The amended complaint alleges that Sheffield violated Section 8(a)(5) and (1) of the Act by unilaterally taking the following actions without prior notice to the NBA or providing the NBA an opportunity to bargain: changing the NBA barbers' commission, requiring the NBA barbers to pay for and provide their own marvicide and paper towels, requiring the NBA barbers to pay for the cost differential of improperly processed coupons, and requiring the NBA barbers to keep customer credit card receipts in the open rather than in the cash register. The General Counsel also asserts that Sheffield violated Section 8(a)(1) by promulgating a new employee conduct policy to chill the NBA barbers' protected concerted activities. Sheffield concedes that it took these unilateral actions but asserts that it was justified in taking these actions. Sheffield raises the defenses that it was not a clear successor to GME, the NBA barbers consented to the new terms by accepting employment, and that the employee conduct policy was posted at Thrower's request and was already contained in the employee handbook.

As provided above, Sheffield is a perfectly clear successor to GME and cannot defend its unilateral actions by asserting that it had the unbridled right to set the terms and conditions of employment for the NBA barbers as it saw fit. Sheffield's assertion that the barbers consented to Sheffield's new terms and conditions of employment because they were not employed until May 1 also lacks merit. The barbers responded affirmatively to Sheffield's explicit verbal offer of employment at the job fair, and Bay's March 21 email plainly indicated that the barbers were to begin the process of preparing for the first day of work by purchasing their own commercial hair removal vacuums after telling the vacuum salesman Danny that they were already employees of Sheffield well before April 28. The employment documents signed on May 2 explicitly instructed the employees to not sign them until *after* accepting employment. The preponderance of the evidence indicates that the NBA barbers were employed on April 28 from the moment they raised their hands in unison to accept Sheffield's verbal offer of employment.

1. Legal standard

Where a unilateral change in the terms or conditions of employment is material, substantial, and significant, such a change constitutes a violation of Section 8(a)(5) and (1) of the Act. *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987) (noting that there is a statutory bargaining obligation where the unilateral change affecting the terms and conditions of

employment of bargaining unit employees is material, substantial and significant. "A change is measured by the extent to which it departs from the existing terms and conditions affecting employees." *Southern California Edison Co.*, 284 NLRB 1205 fn. 1 (1987), enfd. mem. 852 F.2d 572 (9th Cir. 1988).

Not every unilateral change, however, constitutes a violation of the bargaining obligation. Compare *J.W. Ferguson & Sons*, 299 NLRB 882, 892 (1990) (finding that the change was not material, substantial, and significant where the employer increased the lunch break by 5 minutes and decreased the afternoon break by 5 minutes; *Weather Tec Corp.*, 238 NLRB 1535 (1978) (finding the employer's decision to end paying for coffee supplies that employees used was not a material, substantial and significant change) with *The Bohemian Club & Unite Here! Local 2*, 351 NLRB 1065, 1066 (2007) (finding changes to cleaning duties were material, substantial, and significant because cooks had to work an extra 30 minutes to accomplish new tasks, and involved new tasks such as wiping down walls, counters, refrigerator doors, and sweeping the floor) and *Crittenton Hospital*, 342 NLRB 686, 690 (2004); (finding a change in the dress code policy a material, substantial, and significant change to the terms and conditions of employment).

2. Sheffield's changes to the NBA employees' commission

The change in the commission rate touches directly on wages, a mandatory subject of bargaining under the Act. 29 U.S.C. § 159(a). Sheffield changed the rate to 33 percent, then 45 percent, then back to 33 percent without allowing the NBA the opportunity to bargain. Sheffield mistakenly relied on its own legal conclusions and representations made by AAFES in denying both the validity of the existing CBA and the NBA's right to prior notice and an opportunity to bargain over the terms and conditions of the barbers' employment.

Sheffield's insistence that it bargained in good-faith over the NBA barbers' commission is unfounded. On one occasion, Dyson was given prior notice of a change in the commission rate but was nonetheless told that there would be no bargaining over the change. Sheffield repeatedly told Dyson that the NBA's CBA did not dictate the barbers' commission and that the Department of Labor's wage assessments were determinative. As discussed below, Sheffield engaged in coercive behavior during a bargaining session with the NBA, further discrediting its argument that it was a good-faith bargainer. Accordingly, Sheffield's unilateral changes to the commission of the NBA barbers without providing the NBA with prior notice and an opportunity to bargain in good-faith are a violation of Section 8(a)(5) and (1) of the Act.

3. Sheffield's changes to GME policies and practices

The NBA barbers were accustomed to having marvicide and paper towels provided for them by their former employer GME prior to Sheffield's ownership of the Barbershop. Barbers were required to have both items according to the employee handbook, local health and safety laws, and as part of the tools of the trade. Simply put, a barber could not work without possessing an ample supply of marvicide and paper towels at all times. The policies governing the provision of marvicide and paper towels were material aspects of employment, any changes to which were subject to the duties to provide prior notice and an opportunity to bargain. See *Local 2179, United Steelworkers of Am. v. N.L.R.B.*, 822 F.2d 559, 565–566 (5th Cir. 1987) (any subject classified as a "term or condition of employment" is a mandatory bargaining matter). Sheffield's failure to provide notice and bargain with the NBA over the changes to the marvicide and paper towel policies was in violation of Section 8(a)(5) and (1) of the Act.

Sheffield's imposition of a new policy requiring the NBA barbers to pay for the cost differential of improperly processed coupons constituted a substantial and significant change subject to prior notice and bargaining. This policy, when enforced, would affect the wages a barber would receive for their work. Sheffield claimed that it needed to institute this policy to avoid theft and maintain economic viability, however, theft prevention and economic expediency are preempted by the employer's obligation to bargain over a material or substantial term of employment. See *Van Dorn Plastic Machinery Co.*, 265 NLRB 864, 865 (1982), modified 736 F.2d 343 (6th Cir. 1984) (finding a violation of Section 8(a)(5) where the employer implemented a new attendance policy without a compelling economic justification). Accordingly, Sheffield violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented a new coupon rule without providing the NBA with notice and an opportunity to bargain.

Sheffield's requirement that barbers must place receipts outside the register instead of inside the register does not implicate a material or substantial term of employment and could be implemented unilaterally without notice or bargaining with the NBA. This minimal change in policy likely made it more difficult for the barbers to process their tips, as the General Counsel contends. Although this new policy was objected to by the employees, the situation is akin to the slight inconveniences faced by employees after having their break times adjusted by 5 minutes, *J.W. Ferguson & Sons*, and their free coffee eliminated, *Weather Tec Corp*. Absent a showing that the handling of receipts was a significant term or condition of employment, Sheffield was entitled to implement a change in the policy for handling receipts without prior notice or bargaining with the NBA.

III. ALLEGED SECTION 8(A)(1) VIOLATIONS BY SHEFFIELD

A. Surveillance After April 28 Job Fair

The General Counsel alleges that on April 28, after all GME employees had accepted Sheffield employment offers, Sheffield surveilled a small group of NBA employees engaged in protected activities at the Barbershop by telling other employees to find out what was being discussed at the Barbershop. An employer violates Section 8(a)(1), when it "surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and therefore coercive." *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005). Indicia of coerciveness include the "duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation." Id. Similarly, an employer crosses the line of permissible surveillance when its representatives engage in behavior that is "out of the ordinary." *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d. 875 (4th Cir. 1982) (finding that the employer "took action which was quite 'out of the ordinary"' when eleven of its supervisors lined up in varying numbers at the gates

where union handbilling was occurring). Indeed, the mere act of monitoring employees' union activity can contribute to an "atmosphere of fear and intimidation." *Smithfield Packing Co.*, *Ind.*, 344 NLRB 1, 163 (2004). Ultimately, the determination as to whether an employer has engaged in unlawful surveillance is an objective one based on the totality of the circumstances. *Sage Dining Services, Inc.*, 312 NLRB 845, 856 (1993); *Brown Transportation Corp.*, 294 NLRB 969, 971–972 (1989).

In this case, Sheffield's management was aware that the NBA barbers at GME were returning to the Barbershop to discuss the commission rate given the hostility the barbers displayed after being told of their reduced commission to 33 percent. Deardeuff and Michels as Sheffield's management requested that Dyson, Carpenter, and Browning listen in on the NBA barber employees' discussion because they were impliedly excluded from the conversation. On the night of the job fair, Sheffield did not own the Barbershop, distinguishing this case from others like Emenee Accessories and Milco where employers were found to have a right to observe open activities on their own premises. Sheffield's request for certain employees to listen in on a private discussion of wages as terms and conditions of employment occurring on property not yet owned or leased by Sheffield falls within the umbrella of quite "out of the ordinary" activities suggested in *Arrow Automotive Industries*. Regardless of whether the three barbers followed Sheffield's instructions, the request to spy itself can contribute to an atmosphere of fear and intimidation against the NBA's continuing exercise of its Section 7 activities as Sheffield was conveying the message that in the future, Sheffield management would be watching the NBA employees' protected concerted activities. Thus, I find that this spying request was out of the ordinary, and Sheffield has not provided a compelling justification for the request. See *Sands Hotel & Casino*, 306 NLRB 172 (1992) (finding an 8(a)(1) violation for unlawful surveillance where the employer failed to introduce evidence that its "out of the ordinary" conduct was based on legitimate concerns), enfd. 993 F.2d 913 (D.C. Cir. 1993). Under the totality of the circumstances, I conclude that Sheffield violated Section 8(a)(1) of the Act by directing employees Dyson, Carpenter, and Browning to listen in on the employee compensation discussions that occurred at the Barbershop after the job fair and to report back what their spying uncovered to Sheffield management and engaging in the surveillance of employees' union activities. *See, e.g., Methodist Hospital of Kentucky, Inc.*, 318 NLRB 1107, 1133–1134 (1995); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 503 (1995); *Trump Plaza Hotel and Casino*, 310 NLRB 1162 (1993). Accordingly, Sheffield violated Section 8(a)(1) of the Act.

B. Sheffield's Statements About the CBA and During Bargaining

In determining whether an employer's conduct amounts to interference, restraint, or coercion within the meaning of Section 8(a)(1), the test is not the employer's intent, but whether the conduct reasonably tends to interfere with the free exercise of the rights guaranteed employees by the Act. *Idaho Pacific Steel Warehouse*, 227 NLRB 326, 331 (1976). The coercive tendencies of an employer's conduct must be assessed within the totality of circumstances surrounding the incidents alleged to be unlawful. *NLRB v. Brookwood Furniture, Division of U.S. Industries*, 701 F.2d 452, 456 (5th Cir. 1983), *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1342 (5th Cir. 1980), cert. denied, 449 U.S. 889 (1980).

During the April 29 meeting, the NBA barbers informed Sheffield that there was an existing CBA and attempted to bargain over their commission rate. Deardeuff and Bays responded by telling the barbers that the CBA was a fraud, and that the rate of pay was effectively not negotiable. When Dyson spoke up and asserted that she was the president of the NBA, the organization that bargained for the CBA, Bays told her to shut up. Although Sheffield felt justified in its belief that the CBA was fraudulent, Idaho Pacific Steel Warehouse expressly states that the employer's intent carries no weight in the analysis. The swift and immediate rejection of the CBA's relevance and validity was an attempt to undermine the NBA's bargaining authority as ownership transitioned from GME to Sheffield. The silencing of NBA president Dyson, the person most responsible for the creation of the NBA and resultant CBA, would reasonably lead the barbers to believe that asserting the terms of the existing CBA or negotiating with Sheffield via the NBA were both futile endeavors. I find that Sheffield's statement that the CBA was a fraud and Bays telling Dyson to "shut up" are both independent violations of Section 8(a)(1) of the Act.

The General Counsel asserts that on November 13, Sheffield told Dyson that "her labor board was better than their labor board." This assertion was supported by testimony from Carpenter who overheard Dyson having a telephone conversation with Deardeuff. Although Carpenter's testimony was uncorroborated by Dyson, Deardeuff conceded that she told Dyson during a bargaining session on November 17 that the Board did not have the authority to reinstate a commission of 45 percent for the NBA barbers. Deardeuff's dismissal of the Board's authority effectively told the barbers that their rights under the Act were subservient to Sheffield's contract because it was approved by the Department of Labor. Deardeuff did not want to pay a commission rate near 45 percent and used the Department of Labor as a crutch to prevent the NBA from asserting its rights under the Act to restore the higher commission or at least bargain over commission. Under the totality of the circumstances, Deardeuff's comments about having the support of the Department of Labor superior to the National Labor Relations Board were unlawful under Section 8(a)(1) of the Act.

IV. ALLEGED ADVERSE ACTION AGAINST UNCHONG THROWER

The complaint alleges that Monroe and Deardeuff terminated Thrower's employment because she engaged in concerted protected activities and to dissuade others from engaging in such activities. Thrower was one of the leaders behind the NBA's efforts to negotiate a higher commission rate with Sheffield after Sheffield assumed ownership of the Barbershop. Sheffield contends that Thrower's discharge resulted primarily from her bullying of fellow employee Kim. Sheffield also contends that Thrower was an insubordinate employee who engaged in an ongoing pattern of bullying.

In determining whether Thrower was subjected to adverse employer action because she engaged in protected or union activity, the appropriate test is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S.

989 (1982), approved at *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). The General Counsel must initially show the employee's protected activity was a motivating factor in the decision to terminate. See *Coastal Sunbelt Produce, Inc.*, 362 NLRB 997, 997 (2015) **(**"Under *Wright Line*, the General Counsel has the initial burden to show that protected conduct was a motivating factor in the employer's decision"). Establishing unlawful motivation requires proof that: "(1) the employee engaged in protected activity; (2) the employer was aware of the activity; and (3) the animus toward the activity was a substantial or motivating reason for the employer's action." *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009) **(**unlawful motivation found where the employee became active in union activity, the employer was aware that he was leading employee meetings, and the employer singled out the employee for testing**)**.

If the General Counsel prevails, the burden shifts to the Respondent to prove that it would have terminated Thrower regardless of her protected concerted activity. *Wright Line*, 251 NLRB at 1089; *Manno Electric,* 321 NLRB 278, 281 (1996) **(**employer's affirmative defenses failed to establish that it would have transferred the workers to new job sites regardless of their union activities**)**. An employer may not offer pretextual reasons for discharging an employee. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007) **(**finding that employer's reliance on a minor infraction and a claim of insubordination were pretexts for discharging an employee**)**; *Golden State Foods Corp.*, 340 NLRB 382 (2003) (noting that there is no need to perform the second part of the *Wright Line* test if the reasons for discharge are merely pretextual.

A. Thrower Engaged in Concerted Protected Activity

Protected concerted activity is defined as activity which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers* I), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986) (*Meyers* II), cert denied. 487 U.S. 1205 (1988). In *Meyers* II, the Board broadened the scope of the definition to include "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Meyers II*, 281 NLRB at 887.

Thrower led and gathered a group of employees at the Barbershop immediately after the job fair to discuss possible collective actions to take toward getting back their 45.2 percent commission. Thrower further engaged in protected concerted activity when she exchanged correspondence with Sheffield about the barbers' desire to have a meeting with Sheffield management to discuss raising their commission rate. At the meeting, at which all of Sheffield's owners were in attendance, Thrower tried to inform Sheffield that there was a CBA in effect at the barbershop. It is undisputed that these activities were protected under Section 7 of the Act.

In the 2 days prior to her termination, Thrower complained about Sheffield's micromanagement of the barbers, asked Monroe for documentation to verify the alleged failed health inspection, and queried Manager Monroe as to how the barbers would be paid if they worked late. Although Thrower was not specifically authorized to speak on behalf of the other barbers, her activity is nonetheless cognizable under Section 7. See *Wyndham Development Corp.*, 356 NLRB 765, 767 (2011); *Herbert F. Darling, Inc.*, 287 NLRB 1356, 1360 (1988). Thrower's activities raised concerns with new Sheffield business practices that were germane to the other barbers, including Kim who was also present on November 10 when Thrower asked if barbers would be paid for staying late to close the Barbershop. In bringing these group issues to Monroe's attention, Thrower satisfied *Myers II* and earned Section 7 protection for her protected activities.

B. The Discharge was Motivated by Animus

Common indicators of animus are a showing of "suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employee." *Medic One, Inc.*, 331 NLRB 464, 475 (2000). Unlawful motive can be proven by direct evidence or circumstantial evidence of general animus. See *Lewis Grocer Co.*, 282 NLRB 166 (1986) (finding unlawful motivation based on the suspicious timing of discipline and respondent's knowledge that the discriminate was involved in a Board investigation).

Thrower worked at the Barbershop for almost 4 years, and although she was known to have disagreements with co-workers from time-to-time, she did not have a reputation for bullying nor was she disciplined for bullying or any other reason prior to November 2017. By Thrower and Kim's own accounts, the two were amicable and had no major disputes during their tenure together at the Barbershop. The only witnesses who testified that they were bullied by Thrower were Monroe and Deardeuff, both of whom offered inconsistent testimony and were not credible witnesses. Sheffield produced no evidence of previous terminations for bullying, either at the Nellis facility or any other facility that it operated.[115]

Without providing a valid justification, Sheffield determined that Thrower needed to be terminated for bullying Kim even though Monroe originally drafted a written warning for the same offense. Notably, Sheffield failed to do a thorough investigation of Thrower's alleged misconduct, and even took steps to prevent additional investigative measures from occurring. Neither Monroe nor Deardeuff consulted with Thrower prior to making their decision to terminate her. Despite Kim's very limited English language skills, Deardeuff and Monroe made no efforts to corroborate Kim's recounting of her interaction with Thrower. When Dyson attempted to solicit the services of a Korean-language translator, which would have allowed Kim to describe what happened in her native language, Monroe prevented Dyson from taking Kim out of the Barbershop. Deardeuff misconstrued Kim's statements about Thrower being a "strong woman" and relied exclusively on this misinterpretation to terminate Thrower

[115] On cross-examination, Deardeuff mentioned a "Christie Perez" who was allegedly terminated for bullying at a different Sheffield facility. However, no evidence of this termination was produced in response to the General Counsel's subpoena, and thus no weight is given to Deardeuff's testimony on this subject.

despite the obvious ambiguity of Kim's remark and the availability to investigate the matter further. Moreover, Sheffield did not apply its customary progressive discipline policy for this incident as Dyson requested and Sheffield did not issue Thrower a written warning or suspension rather than termination to a first-time discipline offender who had worked at Nellis in the NBA for almost 4 years with no prior disciplinary record.

The Board also find animus towards employees' protected concerted activity where contemporaneous unfair labor practices are found, as in this case where there was unlawful surveillance by Deardeuff and Michels referenced above and Deardeuff's contemporaneous bad faith bargaining with Dyson and the NBA also in April, May, and November. See *Bates Paving & Sealing, Inc.*, 364 NLRB No. 46, slip op. at 3 (2016) (contemporaneous unfair labor practices evidence of animus).

Finally, I find that the Sheffield failed to show that it would have terminated Thrower in the absence of its knowledge that she had engaged in protected concerted activity. To rebut the General Counsel's prima facie case, Respondent asserts that Thrower would have been terminated even absent her concerted protected activity because of her bullying of Kim. As the Board has noted, it is not enough for an employer to merely assert a good reason for its allegedly unlawful action. In order to rebut a prima facie case of discrimination, the employer must show by a preponderance of the evidence that it would have taken the same action for the asserted reasons in the absence of protected activity. *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988); *Peter Vitalie Co.*, 310 NLRB 865, 871 (1993).

The Board has consistently held that "when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for the conduct is not among those asserted." *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985). Monroe and Deardeuff did not provide consistent reasons for why Thrower was terminated. Although the alleged bullying of Kim was the most vocalized reason, other justifications included an alleged pattern of intimidation and bullying, and Thrower specifically bullying Monroe and Fiori. None of these added allegations of intimidation or bullying were documented or corroborated and were all raised for the first time at hearing. Even if the uncorroborated allegations against Thrower possessed merit, the shifting explanations serve as potent evidence that the reasons for Thrower's termination were pretextual. See *U.S. Coachworks, Inc.*, 334 NLRB 955, 957 (2001) (finding the employer's reasons for terminating the discriminate were pretextual where the employer added two new justifications for the discharge at hearing).

The aforementioned circumstances provide a strong indication that Thrower was terminated because of her protected concerted activities. Sheffield has not met its *Manno* burden of proving by a preponderance of the evidence that it would have terminated Thrower regardless of her protected activity. Under the totality of the circumstances, the suspicious character of Sheffield's investigation into Thrower's alleged misconduct, and the shifting reasons for termination create an inference of pretext that sustains the General Counsel's claim that Thrower was terminated in violation of Section 8(a)(1) of the Act.

V. SHEFFIELD'S UNLAWFUL RULES FOR EMPLOYEE CONDUCT

On November 14, Sheffield implemented new rules for employee conduct and posted them in the Barbershop after Thrower's termination. The Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017), did not disturb Board precedent holding that employers may not promulgate new rules in response to union activity or protected concerted activity. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Sheffield claims that the employee conduct policy posted on November 14 was done at Thrower's request. This assertion lacks credibility given that Thrower had just been terminated and supposedly requested the posting to inform the Korean barbers about the policy. Suspiciously, there was no Korean words on the posting at all as the defined listings were in English and not Korean. Sheffield did not introduce evidence indicating that the new policy previously existed in the employee handbook or that the employees were otherwise put on notice prior to November 14. Having failed to meet its burden of establishing that it did not create the new employee conduct policy in response to Thrower's protected concerted activity, Sheffield's implementation of the rule is a violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Sheffield Barbers, LLC (Sheffield), is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Nellis Barbers Association (NBA) is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Sheffield constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All barbers except the base manager, supervisors, and other employees excluded under the terms of the National Labor Relations Act.

4. Since on or about April 28, 2017, the NBA has been the exclusive collective-bargaining representative of Sheffield's employees in the above-described unit.

5. Respondent Sheffield is a successor employer to Gino Morena Enterprises.

6. Since on or about April 28, 2017, Respondent Sheffield engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by refusing, as successor to Gino Morena Enterprises, to recognize and bargain with the NBA as the representative of the employees at the Nellis Air Force Base barbershop performing barber work, concerning their terms and conditions of employment and unilaterally setting initial terms and conditions of employment for unit employees without first giving notice to and bargaining with NBA about those changes including: (a) the reduction of commission rates paid to the unit member employees; (b) changing the marvicide and paper towels policies; and (c), and implementing a new coupon rule.

7. Sheffield engaged in the unfair labor practice of: (a) surveillance of its employees' union activities; (b) stating that the NBA's CBA was a fraud and Sheffield management telling NBA business representative Dyson to "shut up"; and (c) Sheffield commenting to the NBA business representative Dyson about having the support of the Department of Labor superior to the

National Labor Relations Board; within the meaning of Section 8(a)(1) of the Act.

8. By terminating employee UnChong Thrower on November 11, 2017, because of her protected concerted activities for her complaining about Sheffield's micromanagement, it's new rules related to the buddy system and complaining about not being paid to stay beyond regular work hours to close the Barbershop, the Respondent violated Section 8(a)(1) of the Act and interfered with, restrained, and coerced Thrower in the exercise of the rights guaranteed in Section 7 of the Act.

9. By promulgating and maintaining discriminatory rules on November 14, 2017, in retaliation of Thrower's protected concerted activities, Respondent, through Monroe, violated Section 8(a)(1) of the Act.

10. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

11. The Respondent did not otherwise engage in any other unfair labor practices alleged in the complaint.

REMEDIES

Having found that the Respondent Sheffield Barbers, LLC has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I find that they must cease and desist from such practices and take certain affirmative action designed to effectuate the policies of the Act.

Respondent Sheffield Barbers, LLC must also retroactively restore the preexisting terms and conditions of employment set forth in the predecessor GME collective-bargaining agreement with the NBA unit for the period from Sheffield's violation, effective April 28, 2017, until Sheffield and the NBA reach a new agreement or come to impasse. *Adams & Associates, Inc. v. NLRB*, 871 F.3d 358, 373 (5th Cir. 2017), enfg. 363 NLRB No. 193 (2016). A successor employer that unlawfully discriminates to avoid a bargaining obligation is not free to set unilaterally initial terms and conditions of employment. See generally *Smith & Johnson Construction Co.*, 324 NLRB 970, 970 (1997). Had Sheffield acted lawfully in hiring the predecessor's barber employees, it would have been free to set terms and conditions of employment for the bargaining unit. *Burns*, 406 U.S. at 281–283. By ignoring the CBA and the NBA prior offering and accepting employment of all the predecessor's employees on April 28, 2017, Sheffield waived that right. Sheffield is ordered to reinstate the status quo ante, to make NBA employees whole by remitting the decreased commission rate of 12.2 percent as missed commissions absent Sheffield's unlawful conduct, until it negotiates in good-faith to agreement or to impasse. This remedy is necessary to prevent Sheffield from benefitting from its unlawful conduct, including unlawfully ignoring the GME-NBA CBA, and give the bargaining process a chance to work. *U.S. Marine Corp.*, 944 F.2d 1305, 1322–1323 (7th Cir. 1991); *NLRB v. Advanced Stretchforming Int'l, Inc.*, 233 F.3d 1176 (9th Cir. 2000), cert. denied 534 U.S. 948 (2001). Therefore, Sheffield is ordered to recognize and, on request, bargain with the NBA as the bargaining representative of the unit barber employees at Nellis Air Force Base with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document. Also see *Carib Inn of San Juan*, 312 NLRB 1212, 1212 fn. 4 (1993), enfd. sub nom. *NLRB v. Horizons Hotel Corp.*, 49 F.3d 795 (1st Cir. 1995).

Respondent Sheffield shall also be required to rescind, on the NBA's request, any or all of the unilateral changes to the unit employees' terms and conditions of employment made on or after April 28, 2017, and to make unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. Sheffield is entitled to receive a credit for paying the unit employees the correct compensation rate of 45 percent from August 28 to October 22, 2017. The Order shall not be construed as requiring or authorizing Respondent Sheffield to rescind any improvements in the terms and conditions of employment unless requested to do so by the NBA. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent Sheffield shall be ordered to compensate affected employees for any adverse tax consequences of receiving a lump-sum backpay award. Respondent Sheffield shall file a report with the Regional Director of Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

Having concluded that the Respondent is responsible for the unlawful discharge of employee UnChong Thrower, the Respondent must offer her immediate reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed. I also order that Respondent make UnChong Thrower whole, with interest, for any loss of earnings and other benefits that she may have suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Also, Respondent must compensate UnChong Thrower for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 9 (2016). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, the Respondent shall compensate UnChong Thrower for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for her. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). The Respondent shall also be required to expunge from its files any and all references to the written warning, suspension, and discharge, and to notify UnChong Thrower in writing that this has been done and that none of these unlawful disciplines will be used against her in any way.

Respondent shall also rescind or revise its unlawful rules as set forth above. The Respondent shall also post the notice in accord with *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). In

accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. Id. at 13.

On these findings of fact, conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended[116]

ORDER

Having found that Respondent Sheffield Barbers, LLC. has engaged in certain unfair labor practices, I will order that they cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent Sheffield Barbers, LLC., its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with The Nellis Barbers Association (NBA), as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All barbers except the base manager, supervisors, and other employees excluded under the terms of the National Labor Relations Act.

(b) Unilaterally changing wages, hours, and other conditions of employment without bargaining about these changes with the NBA.

(c) Changing the terms and conditions of employment of the unit employees without first notifying the NBA and giving it an opportunity to bargain.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(e) Unlawfully promulgating and maintaining work rules in retaliation of other employee's protected concerted activities;

(f) Unlawfully discharging or otherwise discriminating against Respondent's employees because they openly discuss Respondent's new work rules related to compensation after work hours and any other terms and conditions of employment; and

(g) Engaging in surveillance of its employees' union activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the NBA as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> INCLUDED: All barbers at Nellis Air Force Base employed by the Employer.
>
> EXCLUDED: All base manager, supervisors, and other employees excluded under the terms of the National Labor Relations Act.

(b) Notify the NBA in writing of all changes made to the unit employees' terms and conditions of employment on or after April 28, 2017, and, on request of the NBA, rescind any or all unlawfully imposed changes and restore terms and conditions of employment retroactively to April 28, 2017, with a credit for the proper 45 percent commission rate paid from August 28, 2017, to October 22, 2017.

(c) Make the unit employees whole for any losses sustained due to the unlawfully imposed changes in wages, hours, benefits and other terms and conditions of employment set forth in the Remedy section of this decision.

(d) Compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum, and file with the Regional Director for Region 28, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the back pay award to the appropriate calendar year(s).

(e) Within 14 days from the date of this Order, offer employee UnChong Thrower immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(f) Make employee UnChong Thrower whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, as set forth in the remedy section of this decision.

(g) Compensate employee UnChong Thrower for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate report to the Social Security Administration so that when backpay is paid to Thrower, it will be allocated to the appropriate calendar quarters.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify employee Thrower in writing that this has been done and that the loss of employment will not be used against her in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days from the date of this order, post at its facilities in and around Nellis Air Force Base Barbershop, copies of the attached notice marked "Appendix."[117] Copies of the notice, on forms provided by the Regional Director for Region 28,

[116] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[117] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

after being signed by the Respondent's authorized representative, shall also be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2017.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2018